No. 09-1431

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

LORETTA K. KELLY, WARDEN,

Petitioner,

v.

LEON JERMAIN WINSTON,

Respondent.

**On Petition for Writ of Certiorari**
**To The United States Court Of Appeals**
**For The Fourth Circuit**

# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI


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CAPITAL CASE

## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Fourth Circuit act appropriately in vacating and remanding this case to the district court for consideration in the first instance of evidence presented in a federal evidentiary hearing, where state habeas counsel presented the state court with colorable claims of mental retardation and ineffective assistance of counsel, where state habeas counsel was diligent in her attempt to develop the factual basis of these claims, where the state court nonetheless declined to appoint an expert or hold a hearing on the claims, and where the new evidence presented in federal court was entirely consistent with the state court proffer?

2. Should this Court deny certiorari review of the Fourth Circuit's decision to vacate and remand this case to the district court where the Warden's second question presented is premised upon the demonstrably false assertion that the evidence of mental retardation that trial counsel failed to discover or present "did not exist" at the time of their representation?

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## COUNTERSTATEMENT OF THE CASE

At age sixteen, Leon Winston was classified as a child with mild mental retardation by the Fairfax County, Virginia school district. *Winston v. Kelly*, 592 F.3d 535, 541 (4th Cir. 2010). Though trial counsel had Winston's school records in their possession, they failed to notice this mental retardation classification because they neglected to review fully the records they obtained. *Id.* at 542. Trial counsel's mental health expert also had the classification in his possession, however he made contemporaneous notes during his record review in which he erroneously commented that while Winston was labeled as learning disabled, he never was classified as mentally retarded; the expert later could not remember whether he noticed the classification. *Id.*; JA 1899.[1] The jury deciding Winston's fate never heard the words "mentally retarded."

In state habeas proceedings, the Virginia Supreme Court denied without granting a hearing Winston's claims that his execution would be unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002), and that counsel was constitutionally ineffective for failing to raise the *Atkins* claim at trial. *Winston*, 592 F.3d at 542. Winston proffered the exact same evidence in federal court in support of his claims and the district court granted a hearing, finding that "(1) Winston diligently pursued his habeas corpus claims that *Atkins* bars his execution and that he received ineffective assistance of counsel through the failure to investigate this claim; and (2) it is not wholly implausible that he could establish his claims even in light of AEDPA's deferential standards." JA 617. In preparation for the hearing, federal habeas counsel discovered the report of the intelligence test upon which his mental retardation classification in part was based, which revealed that Winston had obtained an IQ score of 66. *Winston*, 592 F.3d at 542-43. After the hearing, the district court

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[1] References to the Fourth Circuit joint appendix are cited as "JA ___."

concluded that Winston failed to exhaust the claim in state court because the 66 IQ score, when compared with the state court allegation that Winston achieved a score on the 1997 test that was between two and three standard deviations below the mean, served to fundamentally alter the claim. *Id.* at 550.

In a unanimous opinion, the Fourth Circuit opined that the 66 IQ score did not fundamentally alter the claim, vacated the district court judgment and remanded the case for consideration of all of the evidence presented in support of Winston's mental retardation claims. *Winston*, 592 F.3d at 539, 549-51.[2]

## I. TRIAL

On the morning of April 19, 2002, Anthony Robinson and his wife, Rhonda Whitehead, were killed during a home invasion. *Winston*, 592 F.3d at 539. As Winston has fully set forth in his cross-petition for certiorari to this Court, the testimony of Niesha Whitehead, the sole eyewitness and daughter of the victims, was almost perfectly consistent in revealing that Winston was not the triggerman and therefore is ineligible for a death sentence under Virginia law. *See Winston*, 592 F.3d 535 (4th Cir. 2010), *petition for cert. filed* (U.S. May 24, 2010) (No. 09-11068).

At the penalty phase, counsel presented one witness who testified that Winston behaved well in jail pre-trial, one witness to authenticate four psychological evaluations (which counsel neither had the witness read from nor referenced in closing argument), and three social history witnesses

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[2] The Fourth Circuit panel affirmed the denial of Winston's three remaining claims over the dissent of Judge Gregory on two of the claims. Judge Gregory would have granted relief on Winston's claim that he was unconstitutionally denied a lesser included offense charge under *Beck v. Alabama*, 447 U.S. 625 (1980), and on Winston's claim that he received ineffective assistance of counsel at the penalty phase of his trial. *Winston*, 592 F.3d at 561 (4th Cir. 2010) (Gregory, J., dissenting in part). Winston has filed a cross-petition for certiorari in this Court that includes both the *Beck* and sentencing phase ineffectiveness claims. *Winston*, 592 F.3d 535 (4th Cir. 2010), *petition for cert. filed* (U.S. May 24, 2010) (No. 09-11068).

who offered thirteen transcript pages of testimony, total, including cross-examination. *Winston*, 592 F.3d at 564-66 (Gregory, J., dissenting in part); *see also id.* at 571 n.10 ("It is difficult to imagine a capital case in which less testimony at sentencing was presented by defense counsel.").

## II. STATE HABEAS PROCEEDINGS

In state habeas proceedings Winston claimed that he is mentally retarded under the Virginia statutory definition of the term, *see* Va. Code Ann. § 19.2-264.3:1.1, and that trial counsel was ineffective for failing to raise the mental retardation claim. In support of the intellectual functioning prong of the Virginia definition, Winston presented childhood IQ scores of 73, 76, and 77. Winston alleged that when these tests are interpreted in conformity with accepted professional practice, as Virginia law requires, all three scores satisfy the Virginia mental retardation definition.[3] *Winston*, 592 F.3d at 541, 550. Winston further alleged that pursuant to the requirements for a mental retardation classification in Fairfax County, the school would have administered yet another

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[3] Specifically, Winston pointed to two relevant accepted professional considerations that psychologists must take into account when interpreting IQ scores. The first is the standard error of measure, which simply accounts for the fact that IQ scores cannot be viewed as precise, "true" measures of a person's intellectual functioning, but rather must be viewed as a confidence interval within which a person's true IQ most probably lies. The generally accepted confidence interval is plus or minus five points. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000). The second consideration is the well-documented statistical phenomenon that as intelligence tests become further out of date, their standardization samples, or norms, become obsolete. This is because the mean IQ of the population of the United States rises by a consistent factor of 0.3 points per year. As such, tests that are significantly out of date when administered – as all of Winston's tests were – represent an over-estimate of a person's true intellectual functioning. It is therefore necessary to adjust out of date examinations to correct for their obsolete norms. This phenomenon also is referred to as the Flynn Effect, after the man who first discovered it, Dr. James Flynn. *See, e.g.*, James R. Flynn, *The Mean IQ of Americans: Massive Gains from 1932 to 1978*, 95 PSYCHOL. BULL. 29 (1984); James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 PSYCHOL. BULL. 171 (1987); James R. Flynn, *Searching for Justice: The Discovery of IQ Gains Over Time*, 54 AM. PSYCHOL. 5 (1999); MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 56 (10th ed. 2002); Stephen J. Ceci, Matthew Scullin & Tomoe Kanaya, *The Rise and Fall of IQ in Special Ed: Historical Trends and their Implications*, J. SCH. PSYCHOL. 41, 453-65 (2003).

In its opinion denying relief, the Virginia Supreme Court acknowledged that Winston alleged that the Flynn Effect should be taken into account, however it did not make any further findings or rulings regarding its applicability. *Winston v. Warden of the Sussex I State Prison*, No. 052501, 2007 Va. LEXIS 43, at *41-42 (Va. Mar. 7, 2007) (unpublished). The state court's opinion makes clear that it did not actually understand Winston's allegations, however, as it referred to the Flynn Effect as "a multiplier." *Id.* at *42.

intelligence test prior to the classification and that Winston's score was at least two standard deviations below the mean, however the record of this test likely had been destroyed. *Winston*, 592 F.3d at 541. Winston alleged that the Fairfax County diagnostic criteria required "performance on an appropriate, individually administered intelligence measure fall[ing] between two and three standard deviation units (plus or minus the standard error of measurement) below the age-appropriate norms" and "performance on an adaptive skill assessment instrument fall[ing] between two and three standard deviation units (plus or minus the standard error of measurement) below age-appropriate norms," as well as deficits in academic achievement, therefore Winston met the materially identical diagnostic criteria set forth in the Virginia statute. *See* 50-Page Prophylactic Petition for Writ of Habeas Corpus at 32-34 (internal quotations omitted). Winston also presented voluminous educational, psychological, and social service records along with affidavits from numerous family members, teachers, counselors, and social workers, which described Winston's significant adaptive deficits. Finally, Winston submitted affidavits from both trial attorneys and alleged that counsel had no strategic reason for failing to put on a mental retardation defense. Winston asked the state court for funds to hire a mental health expert and for an evidentiary hearing. Both requests were denied. *Winston*, 2007 Va. LEXIS 43, at *51 (unpublished).

## III. DISTRICT COURT

The district court granted an evidentiary hearing on the *Atkins* and *Atkins*-related claims and heard testimony from nine witnesses over the course of two days: the two trial attorneys, two mental retardation experts, the defense expert at trial, Winston's aunt, Winston's special education teacher of four and a half years, the school psychologist who administered the IQ test on which Winston scored a 66, and a member of the Fairfax County special education eligibility committee.

At the hearing, Winston's expert, Dr. Daniel Reschly, concluded that, to a reasonable degree of psychological certainty, Winston is mentally retarded under Virginia law. *Winston*, 592 F.3d at 543. Dr. Reschly opined that Winston suffers from adaptive deficits in all three domains (conceptual, social, and practical), that his IQ scores fall within the range of mild mental retardation on the intellectual functioning prong, and that the onset of Winston's mental retardation occurred prior to age eighteen (and was likely caused by Winston's mother's heavy substance abuse during pregnancy and Winston's resultant diagnosis of Fetal Alcohol Syndrome).[4] *Id.*; JA 1226, 1271. Dr. Evan Nelson, the defense expert at trial, testified that while he did report to trial counsel that he did not believe Winston to be mentally retarded, "it's certainly possible [his] opinion might have been different with this wealth of other information" that was developed post-conviction. JA 720.[5]

The Warden's expert, Dr. Hagan, testified that Winston does not suffer from mental retardation. *Winston*, 592 F.3d at 543. Dr. Hagan, however, did not address anywhere in his 38-page report the fact that at age sixteen Winston was classified as mentally retarded by Fairfax County Schools. JA 1985-2022. When questioned about this omission at the evidentiary hearing, Dr. Hagan responded as follows: "I did address it in my thought process. I don't put every thought, every jot and tittle into the report." JA 1177. In the "bases for opinions" of his adaptive deficit analysis, Dr. Hagan did not make a single reference to anything contained in the hundreds of pages of educational and psychological records that he had in his possession at the time of his evaluation. JA 2002-13. Dr. Hagan neglected to take this information into account despite the fact that the Virginia mental

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[4] Dr. Reschly opined that Winston was a person with mental retardation even prior to the discovery of the psychological report that included the IQ score of 66. *See* JA 1226-63 (Expert Report of Dr. Daniel J. Reschly, Ph.D.).

[5] Even without the benefit of the additional available evidence, Dr. Nelson noted in his report at trial that "[t]he question of Mental Retardation will naturally emerge from the above data." JA 2113.

retardation statute mandates that an adaptive behavior assessment "shall be based on multiple sources of information," and it explicitly lists reports of psychological testing and educational records as two of those sources of information. Va. Code Ann. § 19.2-264.3:1.1(B)(2). Instead, Dr. Hagan based his adaptive deficit analysis almost exclusively on Winston's self-report of his abilities and Winston's conduct inside the maximum security prison in which he is currently housed. JA 2002-13. In its March 6, 2009, Memorandum Opinion denying relief, the district court did not make any credibility findings about Dr. Hagan or any other witness. JA 2130-2161. The court also did not make a finding as to whether Winston is in fact mentally retarded. *Id.*

In its March 6 Opinion, the district court assumed that counsel's failure to present evidence of mental retardation constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). JA 2161. The court noted that counsel conceded that they failed to review the academic and social records they obtained regarding their own client.[6] JA 2147. Instead,

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[6] Had counsel reviewed the records in his possession, he would have been able to present a wealth of information to his expert and to the jury in support of a mental retardation claim. This evidence is set forth more fully in Winston's recently filed petition for writ of certiorari. *Winston*, 592 F.3d 535, *petition for cert. filed* (U.S. May 24, 2010) (No. 09-11068). Such evidence demonstrated a lifelong history of intellectual and adaptive deficits, evident from his first contacts with the school system, when he failed kindergarten twice. JA 1909. Dr. Daniel Reschly, Winston's expert in federal habeas proceedings, stated that "[i]n [his] 40 years of experience evaluating and supervising the evaluations of school age children, this is the first time [he has] encountered a case of a child spending a third year in kindergarten." JA 1241.

The district court heard testimony from Denise King, Winston's special education teacher at the Leary School. The Leary School is a school of last resort in Fairfax County for children with severe intellectual or behavior problems. JA 739. King stated that academically Winston "was the lowest student for the whole four years [she] had him." JA 747.

Winston's deficits continued to plague him throughout his teenage years and beyond. When Winston was fifteen years old, it was noted that "talking with Leon is like talking with a much younger child who is eager to please." JA 1917, 1919. The examiner described Winston's gullibility, naiveté, and tendency for victimization:

> When Leon talks about his troubles with "the law," the listener is struck by how passive his role always seems. For example, he said that the first incident occurred when someone put something in his desk and told everyone it was a drug. On the other occasions mentioned above, he watched, or he was the look out, or he was there. However, in his view, at least, it was always someone else doing the action. This evaluation suggests that he may be telling the truth as he is a very passive individual who follows others into trouble.

counsel passed the records along to their expert without ever having carefully reviewed them. *Id.* As the district court explained, "[a]lthough counsel's 'strategic choices made after thorough investigation . . . are virtually unchallengeable,' *Strickland*, 466 U.S. at 690, contextually, simply not reading essential documents that are facially significant to competent capital defense counsel did not seem to this court to be any choice at all." JA 2147 (alteration in original); *see also id.* ("[B]y his own account Drewry thought the records he failed to read would have been 'very valuable' because they documented that the '*Commonwealth* diagnosed [Winston] with mental retardation as a child.'") (emphasis and alteration in original). The district court also ruled that while it is "aware of and sensitive to the difficulties and burdens capital trial counsel must frequently shoulder," and that it is "essential that [trial counsel] be able to delegate certain tasks and rely on expert opinions with confidence," nevertheless "capital trial counsel cannot outsource their fundamental responsibilities." JA 2147 n.14.

Although it assumed deficient performance, the district court denied relief after conducting a "retrospective" § 2254(d) analysis and concluding that the state court was not unreasonable in finding that Winston could not demonstrate *Strickland* prejudice. JA 2156-61. In its retrospective prejudice analysis the district court ruled that it could not consider Winston's IQ of 66 – or apparently any of the evidence presented at the evidentiary hearing – because in its view the score of 66 fundamentally altered the state court claim. JA 2150.

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JA 1919. The examiner recommended that "[i]n working with Leon, it is important to speak in very concrete terms, provide clear structure and use concepts and vocabulary that could be understood by a nine year old child." JA 1921. In the psychological evaluation that reported the 66 IQ score, conducted when Winston was sixteen years old, the evaluator opined that Winston was "significantly delayed in his ability to reason and conceptualize with language in order to understand more abstract ideas and underlying concepts and expectations." JA 1980. The evaluator observed that "[i]t is particularly surprising how little Leon appears to understand about social expectations and the reasons behind accepted social practices." JA 1980. The report stated that Winston's "current evaluation yields a fairly evenly delayed profile of cognitive, social, and emotional functioning, generally within the mild range of mental retardation." JA 1982.

## IV. FOURTH CIRCUIT

A unanimous panel of the Fourth Circuit vacated the district court's judgment and remanded the case to the lower court. The Fourth Circuit held that the district court correctly found that Winston did not fail to develop the factual basis of his claims in state court, therefore a hearing was permitted. *Winston*, 592 F.3d at 551-52. The court further opined that the IQ score of 66 did not fundamentally alter the state court claims, thus the district court erred by failing to consider the score. *Id.* at 549-51. The court also determined that, upon remand, the district court should consider the claims *de novo*, because the state court chose not to adjudicate the full merits of the claims when it dismissed the colorable claims without an evidentiary hearing. *Id.* at 553-59. Finally, the Fourth Circuit directed that upon remand, the district court would nonetheless be bound by 28 U.S.C. § 2254(e)(1) and as such must presume that the findings of fact the state court did make are correct unless rebutted by clear and convincing evidence. *Id.* at 557.

In this opinion, the Fourth Circuit made clear its adherence to the provisions of AEDPA and its duty and willingness to defer to reasonable state court decisions. The Warden nonetheless claims that the Fourth Circuit's decision represents yet another in a growing line of federal court decisions that "have chosen to disregard AEDPA." Petition at 20. For instance, the Warden claims that the Fourth Circuit "held that when a state court denied a hearing, the State forfeits the exhaustion/procedural default doctrine." Petition at 11. The Warden does not cite to any portion of the lower court's opinion in support of this claim, nor could she; there is nothing in the opinion that could be characterized as such a holding. To the contrary, the Fourth Circuit began its discussion of these claims by reiterating that, despite the fact that an evidentiary hearing was denied in state court, before a federal court can consider additional evidence a petitioner must clear the two

hurdles of exhaustion and diligence:

> The application of AEDPA is, of course, implicated in the question of whether the district court should have considered Winston's new evidence. We agree with the district court's original observation that the question raises both an exhaustion issue and a failure-to-develop issue.

*Winston*, 592 F.3d at 549.

The Fourth Circuit reviewed the district court's decision to grant an evidentiary hearing and found that

> we cannot say that the district court abused its discretion in holding an evidentiary hearing. The district court specifically considered whether to hold a hearing in light of AEDPA's deferential standards, and the court concluded that it was not implausible that Winston would succeed if he proved the facts alleged in his petition. Winston had never had a hearing on his *Atkins* and *Atkins*-related ineffective assistance claims because the Virginia Supreme Court denied him one, and the district court acted properly to provide him such an opportunity on a colorable claim. The district court narrowly tailored the hearing to supplement the record on a particular issue, and there was no attempt to retry the entire case against Winston.

*Winston*, 592 F.3d at 552-53.

The Fourth Circuit noted that the district court specifically declined to revisit its original decision that Winston had exercised diligence in developing the claim in state court:

> In its post-hearing second opinion the district court declined to reconsider its finding of diligence. It is therefore somewhat puzzling that the state goes so far as to declare in its brief that "[t]he district court's finding with respect to Winston's failure to develop this claim is exceptionally clear: Winston did not exercise due diligence." The state is wrong.

*Winston*, 592 F.3d at 551 (internal citations omitted).[7]

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[7] The lower court stated that

> [p]erhaps the district court confused the state by considering Winston's failure to seek a subpoena in its analysis of the exhaustion question. Whether Winston could have or should have sought a subpoena is relevant to the issue of Winston's diligence, not the issue of exhaustion. In any event, we do not read the district court's discussion of the subpoena matter as a retreat from its otherwise clear finding of diligence. Moreover, as we have noted, whatever fault the district court assigned to

Since the Fourth Circuit also concluded that the IQ score of 66 did not fundamentally alter the state court claims (*Winston*, 592 F.3d at 550), it held that

> [b]ecause we can find no legitimate justification for the district court's exclusion of Winston's 1997 I.Q. score, we conclude that remand is appropriate so that the court can consider Winston's *Atkins*-related ineffective assistance claim with the score in evidence. The district court was wrong to exclude the score on the ground that it rendered Winston's claim unexhausted, and the state is wrong that the score should have been excluded because the hearing in which the score was introduced was improperly granted. Winston is entitled to a decision on his claim based on all of the admissible evidence in the record. We remand for the district court to make this decision in the first instance.

*Winston*, 592 F.3d at 553.

The Fourth Circuit further concluded that review of the mental retardation claims implicated both 2254 §§ (d)(2) and (e)(1):

> Finally, we note that because mental retardation is at bottom a factual issue, review of Winston's new evidence implicates § 2254(d)(2) and § 2254(e)(1), both provisions of AEDPA governing federal habeas review of state court factual findings.

*Winston*, 592 F.3d at 549 (internal citations omitted). The court concluded that the two provisions "will both ordinarily apply even after a district court has properly held an evidentiary hearing." *Id.* at 555. However, the court determined that § 2254(d) does not apply in this particular case because when the state court failed to permit further fact development on these colorable claims, it thereby failed to adjudicate the claims based on a full and complete record. *Id.* at 553. Thus, the prerequisite to the application of § 2254(d) was not satisfied – that is, there was no adjudication of the full merits of these particular claims. *Id.* The court reiterated, however, that upon remand to the district court, § 2254(e)(1)'s presumption of correctness will apply. *Id.* at 557.

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Winston for failing to seek a subpoena was simply misplaced.

*Winston*, 592 F.3d at 552.

Furthermore, under the Warden's interpretation of the lower court's opinion, "every circuit except the Ninth, and now the Fourth, requires § 2254(d) deference to summary state court decisions."[8] Petition at 21 (citations omitted). It is unclear to what the Warden is referring here, as the state court opinion in this case has never been described as "summary" by either party or any court during the entirety of the prior proceedings in this case. In any event, nowhere did the Fourth Circuit create a blanket rule that anytime a state court denies an evidentiary hearing, a petitioner can present new evidence in federal court and the state court is subsequently due no deference under AEDPA. In fact, the Fourth Circuit explicitly considered the notion that its decision in this case would increase the number of cases in which a habeas petitioner is entitled to *de novo* review and determined that fear to be unfounded:

> The court in *Wilson* [*v. Workman*, 577 F.3d 1284 (10th Cir. 2009)] also addressed what might be an additional concern with our conclusion today: that habeas petitioners seeking de novo review of their claims need only produce some small sliver of new evidence in federal court. Like the *Wilson* court, we conclude that this concern is "greatly exaggerated." As we have emphasized above, the requirements that petitioners exhaust their state court remedies and diligently develop the record in state court are exacting burdens. Even if the state courts deny a petitioner's request for an evidentiary hearing, new evidence surfacing in federal court that fundamentally alters a claim will render the claim unexhausted. Similarly, while requesting an evidentiary hearing from the state courts may be necessary to satisfy § 2254(e)(2)'s diligence requirement, it may not always be sufficient. "In light of these safeguards, we see little risk that habeas petitioners will misapply [our] holding to obtain unwarranted de novo review in the federal courts."

*Winston*, 592 F.3d at 556-57 (internal citations omitted).

## REASONS FOR DENYING THE WRIT

The Warden is asking this Court to reverse an opinion of her own creation, rather than the

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[8] The Warden then cites a string of cases from the remaining circuits that hold that § 2254(d) applies to summary state court decisions, however these decisions provide little or no explanation for their holdings. Petition at 21.

opinion of the Fourth Circuit Court of Appeals in this case. According to the Warden's petition for certiorari, this case happens to present every conceivable disputed issue in federal habeas corpus law – including those issues already before the Court in *Harrington v. Richter*, 130 S. Ct. 1506 (2010) (No. 09-587), and *Cullen v. Pinholster*, 177 L. Ed. 2d 323 (2010) (No. 09-1088) – and she is petitioning this Court in the hope that it will grant certiorari and issue her proposed treatise, rather than an opinion that is in any way tied to the uncontroversial and highly fact-specific analysis in which the Fourth Circuit actually engaged. The Fourth Circuit's opinion is so uncontroversial that not a single judge requested a poll on the Warden's petition for rehearing *en banc*. This Court should deny certiorari.

## I. THE WARDEN'S ARGUMENTS IN SUPPORT OF A GRANT OF CERTIORARI ON QUESTION ONE ARE MERITLESS.

The application of § 2254(d) is appropriate only where a state court adjudicates the merits of a petitioner's claim. The Fourth Circuit took no extraordinary step by holding that where a federal court properly holds an evidentiary hearing (i.e., where a petitioner clears or avoids the § 2254(e)(2) hurdle), and where the new evidence presented during the course of that hearing does not fundamentally alter the state court claim, the federal court is permitted to consider such evidence. If the post-hearing merits of the claim before the federal court are different than those adjudicated by the state court, then according to the plain language of § 2254(d), the provision does not apply.

### A. The Fourth Circuit's Application Of The Provisions Of AEDPA Is Consistent With The Text Of The Statute As Well As This Court's Prior AEDPA Decisions.

The Warden claims that a district court may not conduct a § 2254(e) inquiry (to determine whether a hearing is permitted and/or whether a petitioner can rebut state court factual findings with clear and convincing evidence) – or *any* type of inquiry, for that matter – unless and

until the court conducts a reasonableness inquiry pursuant to § 2254(d). The Warden claims that "AEDPA mandates that federal habeas corpus courts must determine, as a threshold matter, whether a state court's merits adjudication was constitutionally unreasonable." Petition at 15. The rigid order of analysis suggested by the Warden is inconsistent with the language of the statute as well as this Court's prior decisions.

In order to establish his entitlement to relief, a habeas petitioner must demonstrate that he "is in custody in violation of the Constitution," § 2254(a), and that the state court decision was unreasonable under § 2254(d)(1) or (2) (if § 2254(d) applies). In other words, before a federal court can grant habeas relief, a petitioner must establish 1) that a constitutional right has been violated, and 2) that a remedy may issue, either because § 2254(d) does not apply or because the petitioner has satisfied one of the provisions of § 2254(d). Contrary to the Warden's suggestion, a federal court need not address the questions posed by §§ 2254(a) and (d) in any particular order.[9] *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

Neither the language of the statute nor this Court's decisions in AEDPA cases preclude a federal court from undertaking merits review of a claim or granting an evidentiary hearing prior to making a determination whether 1) § 2254(d) applies in the first instance; or 2) a state court adjudication was unreasonable under §§ 2254(d)(1) or (d)(2). In fact, it may be necessary (or, at a

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[9] The Warden contends that "Congress placed the deference language at the threshold of the statute." Petition at 19. Of course, the Warden fails to acknowledge those portions of the statute that precede § 2254(d), obviously the statute begins with § 2254(a), which requires a petitioner to demonstrate a violation of a constitutional right. Additionally, while the Warden claims that "AEDPA presents a simple, decisional tree for federal court review of state prisoners' habeas corpus claims," (Petition at 30), she fails to reference § 2254(a) at all in her "simple decisional tree." Winston submits that there simply is no support for the Warden's suggested order of analysis. In any event, the Warden's theories about the proper application of the provisions of AEDPA do not provide an appropriate basis for certiorari review, as the Warden is asking this Court for a broad ruling regarding the statute's application that is divorced from the set of facts presented in this case. *See, e.g., Beard v. Kindler*, 130 S. Ct. 612, 619 (2009) ("The procedural default at issue here – escape from prison – is hardly a typical procedural default, making this case an unsuitable vehicle for providing broad guidance on the adequate state ground doctrine.").

minimum, serve the court well) to engage in some form of the merits analysis associated with § 2254(a) before a federal court can perform the analysis contemplated in § 2254(d). As this Court explained in *Penson v. Ohio*, 488 U.S. 75 (1988), "simply putting pen to paper can often shed new light on what may at first appear to be an open-and-shut issue." *Id.* at 81, n.4. In the § 2254(d) context, the process of putting pen to paper to assess factual determinations can similarly shed light on what may at first appear to be an open-and-shut determination that the state court's decision was reasonable.[10]

The Warden cites only one case in support of her theory. The Warden contends

> [t]hat the deference standard, with its inquiry into the reasonableness of the state court decision, is a *threshold* matter, cannot be questioned. Congress placed the deference language at the threshold of the statute. (App. 177a). This Court has described it so: "our cases have [used the 'deference' description] . . . over and over again to describe the effect of the *threshold restrictions* in 28 U.S.C. § 2254(d). . . ." *Lett* (slip op. at 6 n.1).

Petition at 18-19 (emphasis and alterations added by the Warden). Of course, when the unaltered language of this Court's opinion in *Renico v. Lett*, 130 S. Ct. 1885 (2010), is examined, it becomes far less clear that the opinion supports the Warden's contention:

> The dissent correctly points out that AEDPA itself "never uses the term 'deference.'" But our cases have done so over and over again to describe the effect of the threshold restrictions in 28 U.S.C. § 2254(d) on *granting federal habeas relief* to state prisoners.

*Lett*, 130 S. Ct. at 1862 n.1 (emphasis added). This language simply serves to reiterate the uncontroversial proposition that § 2254(d) – when it applies – serves as a limitation on habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007) (§ 2254(d) "sets forth a precondition to the grant of

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[10] For instance, in order for a federal court to determine what the merits of the constitutional claim are, it may be necessary first to conduct an evidentiary hearing (§ 2254(e)(2) permitting).

habeas relief"). Nothing in this Court's *Lett* opinion supports the Warden's suggestion that the reasonableness analysis under § 2254(d) must be undertaken by federal courts as an initial inquiry.

Even if *Lett* supported the Warden's claims regarding the supposedly mandated order of analysis to be conducted by federal courts, numerous other opinions of this Court indicate that such rigid ordering is not appropriate in every case. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387-90 (2005) (thoroughly reviewing the merits of Rompilla's ineffective assistance of counsel claim before concluding that the state court's conclusion regarding deficient performance was unreasonable under § 2254(d)); *Ramdass v. Angelone*, 530 U.S. 156, 167-78 (2000) (engaging in a lengthy analysis of the merits of Ramdass' constitutional claim before concluding that the state court's adjudication was not unreasonable under § 2254(d)); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264-65 (2010) (conducting *de novo* review and finding Thompkins' *Miranda v. Arizona* claim to be meritless, then concluding that the state court's decision was "therefore necessarily reasonable under the more deferential AEDPA standard of review"). In *Thompkins* the Court explained that:

> Courts cannot grant writs of habeas corpus under § 2254 by engaging only in *de novo* review when it is unclear whether AEDPA deference applies, § 2254(d). In those situations, courts must resolve whether AEDPA deference applies, because if it does, a habeas petitioner may not be entitled to a writ of habeas corpus under § 2254(d). Courts can, however, deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petition will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review, see § 2254(a).

*Thompkins*, 130 S. Ct. at 2265.

Additionally, in *Schriro v. Landrigan*, 550 U.S. 465 (2007), this Court made clear that while federal courts "must take into account [the deferential standards prescribed by § 2254(d)] in deciding whether an evidentiary hearing in appropriate," the decision whether to grant an evidentiary hearing

remains within the sound discretion of the district court. *Id.* at 473; *see also id.* at 474 ("It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not *required* to hold an evidentiary hearing.") (emphasis added). Under *Landrigan* it is clear that where a district court determines that "it is not wholly implausible that [the petitioner] could establish his claims even in light of AEDPA's deferential standards," *Winston*, 592 F.3d at 552, an evidentiary hearing is permitted (even absent an initial finding that, if § 2254(d) applies, the petitioner has satisfied one of its provisions).[11]

> Also, in *Miller-El v. Dretke*, 537 U.S. 322 (2003), this Court explained that
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> > [e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

*Id.* at 341. Because it would be difficult if not impossible for a federal court to "disagree with a state court's credibility determination" without first conducting something akin to *de novo* review, or without conducting an evidentiary hearing or taking additional evidence, this Court's decision in *Miller-El* is inconsistent with the Warden's suggestion that a federal court must assess reasonableness under § 2254(d) before independently reviewing the constitutional claim.[12]

### B. The Parties Agree That AEDPA Deference Should Not Be Set Aside Based Solely On The Denial Of An Evidentiary Hearing In State Court.

The Warden's second argument in support of the grant of certiorari is that "[a] federal habeas

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[11] Therefore, contrary to the Warden's claim in Section I(E) of her Petition, the Fourth Circuit's opinion does not conflict with *Landrigan*.

[12] Only in rare cases – where the inability to satisfy the provisions of § 2254(d) was immediately clear – has this Court expressed comfort in jumping directly to a reasonableness analysis under § 2254(d) without further consideration of the merits of the constitutional claim.

corpus court may not set aside the deference standard based upon state court procedures such as summary dismissal or denials of evidentiary hearings." Petition at 20. The Warden mistakenly characterizes the state court's adjudication in Winston's case as a summary decision, presumably in an attempt to link Winston's case to *Harrington v. Richter*, 130 S. Ct. 1506 (2010). This attempt should be rejected. The question before this Court in *Richter* is whether a state court summary dismissal is entitled to AEDPA deference. The state court decision in *Richter* failed to provide any explanation for its denial of Richter's *Strickland v. Washington*, 466 U.S. 668 (1984), claim. In Winston's case, however, the Virginia Supreme Court issued a written opinion, albeit an unreasonable one, in which it addressed the undeveloped merits of Winston's ineffectiveness claim.[13] There is no meaningful connection between these two cases.

The Warden also asks this Court to address the question of whether a federal court may set aside AEDPA deference where a state court denies a hearing. This case, however, does not present such a question, as the Fourth Circuit did not create any blanket rules regarding the effect of state court decisions made without the benefit of an evidentiary hearing. Even if the question were properly before the Court, the parties do not dispute the answer: the Warden and Winston agree that a state court's failure to grant an evidentiary hearing does not automatically entitle a petitioner to *de novo* review in federal court. A grant of certiorari based on this question would be inappropriate.

### C. The Fourth Circuit's Analysis Of The Relationship Between §§ 2254(d)(2) And (e)(1) Is Consistent With The Warden's Suggestion.

The Warden contends that this Court should grant certiorari to confirm that §§ 2254(d)(2) and (e)(1) "are part of the same deference to state court judgments that Congress mandated."

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[13] The state court did not address the merits of Winston's free-standing *Atkins* claim, holding that the claim was procedurally defaulted because counsel failed to raise it at trial and on direct appeal.

Petition at 23. The Fourth Circuit already has done so. The lower court embraced the Warden's theory and held that §§ 2254 (d)(2) and (e)(1) "will both ordinarily apply even after a district court has properly held an evidentiary hearing." *Winston*, 592 F.3d at 555. The Fourth Circuit's determination that § 2254 (d)(2) did not apply to the particular claims at issue here was a fact-intensive one and was limited to the circumstances present in Winston's case. According to the Fourth Circuit, Winston was entitled to *de novo* review of his mental retardation claims not merely because the state court denied an evidentiary hearing, but because 1) these claims were colorable; 2) Winston did not fail to develop the factual basis of his claims in state court, 3) a hearing was properly granted in federal court; 4) additional evidence in support of his claims was adduced during that evidentiary hearing; and 5) this additional evidence did not fundamentally alter Winston's state court claim.[14]

## II. THIS CASES IS NOT AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED BY THE WARDEN.

### A. The Questions Presented By The Warden Are Based On Misrepresentations Of Fact And Law.

The Warden has attempted to convince the Court that this case presents a "rare[]" opportunity to address no fewer than seven issues regarding application of the provisions of AEDPA that allegedly plague the lower courts. Petition at 13-14 (Winston's case "would permit resolution of all these issues"). In reality, the lower court failed to take any extraordinary steps in this case, but

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[14]Certiorari review also is not warranted here because, once again, the Warden's argument is based on a mischaracterization of the lower court's holding. The Warden claims that the Fourth Circuit "reinterpreted the Act in such a way as to liberally permit the federal court to authorize new fact-finding, and then to reason backwards to conclude that the state court's decision was not deserving of either deference or a presumption of correctness." Petition at 25-26. To the extent that the Warden is contending that the Fourth Circuit relied on the evidence presented in federal court to determine that the state court's adjudication was unreasonable, no such finding was made by the lower court. And, as explained above, the Fourth Circuit confirmed that upon remand the state court factual findings are entitled to a presumption of correctness. *Winston*, 592 F.3d at 557.

instead merely applied established provisions of AEDPA to the specific factual circumstances of Winston's case. Contrary to the Warden's allegations, the lower court did not create any new blanket rules regarding the application of the statute. This fact-specific application resulted in an order remanding the case to the district court for further consideration.[15] This Court has recently been presented with at least one other case in which a Petitioner has claimed, in an effort to obtain certiorari review, that his case presents an appropriate vehicle to address an AEDPA issue, only to find that the questions presented were not in fact present in the case at hand. *See Bell v. Kelly*, 129 S. Ct. 393 (2008) (Mem.).

**B. Application Of The "Cause and Prejudice" Standard, Even If Warranted, Would Not Alter The Lower Court's Opinion And Would Require This Court To Decide A Contested Issue Of State Procedural Law.**

The Warden claims that the Fourth Circuit erred by failing to conduct a "cause and prejudice" analysis:

> In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court held that facts, as well as claims, come under the procedural default doctrine. Presentation of a fact to the federal court that was not presented to the state court will be barred from federal habeas review absent a showing of "cause and prejudice" or "actual innocence." . . . The district court's analysis precisely followed this Court's precedents: it found, after a full evidentiary hearing, that Winston did not diligently attempt to develop his facts in state court. It thus properly found no "cause" for the default. It also properly found no "actual innocence" under *House*.

Petition at 28-29 (internal citations omitted).

The Warden faults the Fourth Circuit for holding "that the procedural default doctrine was

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[15] The Fourth Circuit simply has not broken new ground here. *See, e.g., Holland v. Jackson*, 542 U.S. 649 (2004) (mentioning uncritically the Fourth Circuit's decision in *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003), in which the lower court conducted *de novo* review where new evidence was presented in federal court "on the theory that there is no relevant state court determination to which one could defer"). Contrary to the Warden's characterizations, the Fourth Circuit has not now embraced a more hostile treatment of state court decisions. The Fourth Circuit merely has done what is appropriate in light of the unique circumstance of this case, and it has done so in a manner consistent with the Tenth Circuit Court of Appeals. *See Wilson v. Workman*, 577 F.3d 1284, 1287 (10th Cir. 2009) (en banc).

inapplicable after a federal evidentiary hearing. (App. 26a)." Petition at 29. According to the Warden, the lower court "erroneously followed a pre-*Keeney* case, *Vasquez v. Hillary* [sic], 474 U.S. 254 (1986), to hold that, where the new facts do not fundamentally alter the claim, the federal court is free to consider them. (App. 27a)." *Id.*

While far from clear, it appears that the Warden is suggesting that before a federal court can consider new evidence in federal court, the court must assess diligence before granting a hearing (under § 2254(e)(2)) *and* again after granting a hearing (under *Tamayo-Reyes*). There is simply no support for the Warden's contention, nor is there any debate among the lower courts that this suggested series of inquiries is inappropriate.[16]

The Warden attempts to create a conflict out of whole cloth by ignoring the evolution of fact-development standards in federal court. In *Townsend v. Sain*, 372 U.S. 293 (1963), the Court enumerated six circumstances under which an evidentiary hearing in federal court was mandatory in habeas corpus cases, establishing a strong federal policy favoring hearings and factual development in federal court. *Id.* at 312, 322. *See also* Rule 8 of the Rules Governing Section 2254 Cases in United States District Court. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court limited mandatory (but not discretionary) hearings to facts that were not subjected to a full and fair

[16] The Warden claims that "[t]his case affords a unique opportunity for the Court to resolve the conflict identified in the courts between the Court's established 'cause and prejudice' standard barring new facts in federal court, and § 2254(e)(2)'s separate conditions precedent to any evidentiary hearing in federal court." Petition at 30 (citing *Holland v. Jackson*, 542 U.S. at 653, and *Monroe*, 323 F.3d at 297-99). Neither of these cases, however, present the issue manufactured by the Warden here. In fact, in *Jackson*, this Court found that evidence first presented to the state court seven years after his initial post conviction motion "could have been the subject of an evidentiary hearing by the District Court, but only if respondent was not at fault in failing to develop the evidence in state court, or (if he was at fault) if the conditions prescribed by § 2254(e)(2) were met." *Jackson*, 542 U.S. at 652-53. The Court noted that neither the district court nor the Sixth Circuit made any findings or conducted any independent inquiry into whether § 2254(e)(2) was applicable and, if so, whether its provision were met. Nowhere in this Court's discussion of the claim or the new evidence presented in support thereof did this Court mention or apply the "cause and prejudice" doctrine in the manner suggested by the Warden.

hearing in state court through no fault of the petitioner, thereby overruling one of the six instances in which *Townsend* mandated a hearing.[17] *Tamayo-Reyes*, 504 U.S. at 6-7. Under *Tamayo-Reyes*, the federal courts were still permitted to grant evidentiary hearings in their discretion even where the petitioner failed to present material facts in state court. AEDPA further narrowed the entitlement to an evidentiary hearing. Under AEDPA a petitioner who is at fault for failing to develop facts in state court may not present new facts via an evidentiary hearing in federal court unless he can satisfy § 2254(e)(2)'s stringent cause and innocence standards. *See* 1 R. Hertz & J. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.1b, p. 892 (5th ed. 2005). There is no basis to conclude that a separate "cause and prejudice" standard is applicable to new facts developed in a properly-granted hearing in federal court. As the Court explained in *Tamayo-Reyes*, instituting the "cause and prejudice" inquiry was designed to create a check on federal evidentiary hearings. *Tamayo-Reyes*, 504 U.S. at 9-10. This purpose is now served by § 2254(e)(2).

It is clear that *Tamayo-Reyes* and § 2254(e)(2) involve the same type of inquiry, namely whether a petitioner who is at fault for failing to present facts in state court is entitled to an evidentiary hearing in federal court.[18] The Fourth Circuit determined that the provisions of § 2254(e)(2) did not apply in this case because Winston did not fail to develop the factual basis of his

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[17] *Townsend* required federal hearings on all material facts not addressed in state court unless the petitioner had "deliberate[ly] bypass[ed]" a hearing on the issue in state court. *Townsend*, 372 U.S. at 317.

[18] The Warden nevertheless chastises the lower court for

> confusingly discuss[ing] § 2254(e)(2)'s diligence requirement, a statute which addresses when the federal court may *hold a hearing, not when it may consider defaulted facts*. Rather, the determination of whether defaulted facts can be considered is one governed by exhaustion, default and "cause and prejudice."

Petition at 29 (emphasis in original) (citation omitted). The Warden's criticism is curious given that *Tamayo-Reyes* also addresses the question of when a petitioner is entitled to an evidentiary hearing.

claims in state court. Even if it were still appropriate to conduct a "cause and prejudice" analysis under *Tamayo-Reyes*, it would not be relevant here, as such an analysis is only appropriate where the petitioner was at fault for failing to present facts in state court.[19]

Additionally, even if the Warden's proposed post-hearing cause and prejudice inquiry were founded, this case presents a poor choice for certiorari review as the resolution of the diligence or "cause" question turns on a disputed issue of state procedural law. The disputed procedural issue is whether Virginia state law required Winston to seek a subpoena (in order to obtain the 66 IQ score report) from the Virginia Supreme Court. Winston did not make such a request in the Virginia Supreme Court. Although the district court subsequently held this fact against Winston in determining that the presentation of the score in federal court fundamentally altered the claim, the Fourth Circuit correctly noted that while capital habeas petitioners are required to file their petitions and request an evidentiary hearing in the Supreme Court of Virginia, "[o]nly if that court grants the hearing request and refers the petitioner to a circuit court for discovery would a subpoena request be appropriate." *Winston*, 592 F.3d at 551; Va. Code Ann. § 8.01-654(C)(1).

In her petition for certiorari, the Warden variously refers to the Fourth Circuit's statement as "inexplicabl[e]," a "gross misstatement of state law," and an "alarming misstatement of state law." Petition at 28 n.7, 29. The Warden simply is wrong. The Warden does not dispute the fact that evidentiary hearings in capital habeas cases take place in the circuit court that entered the sentence of death, but only if the Virginia Supreme Court directs the circuit court to conduct a hearing. Va.

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[19] There can be little doubt that if Winston can avoid or clear the § 2254(e)(2) hurdle, he also can avoid or clear any "cause and prejudice" hurdle. The Fourth Circuit's failure to develop and exhaustion analyses indicate the lower court's belief that Winston's state habeas counsel was diligent in her attempts to investigate and present the factual basis of the claims. Thus, the outcome in Winston's case would not change even if this Court adopted the Warden's theory.

Code Ann. § 8.01-654(C)(1)-(3). While the Warden is correct that Part 4 of the Virginia Supreme Court Rules governs discovery in habeas corpus proceedings, she fails to mention that Virginia Supreme Court Rule 4:0, titled "Application of Part Four," states that "[t]he Rules in this Part Four shall apply in civil cases in the *circuit* courts. They also shall apply to proceedings for separate maintenance, divorce or annulment of marriage, for the exercise of the right of eminent domain, and for writs of habeas corpus or in the nature of coram nobis as provided in Rule 4:1(b)(5)." Va. Sup. Ct. R. 4:0(a) (emphasis added). Thus, the most natural reading of Rule 4:0 is that the discovery procedures set forth in Part 4 apply in all of the enumerated types of proceedings in the *circuit* courts, precisely as the Fourth Circuit described. Although Winston acknowledges that the rule is mildly ambiguous, the Warden points to no other state law authority that suggests that the Virginia Supreme Court has the power to issue subpoenas in habeas corpus proceedings prior to sending them to the trial court for a hearing, and certainly points to no case in which the Virginia Supreme Court actually has done so. Further, the Warden's reading of state law also is illogical. It makes much more sense, as Winston submits the rules dictate, for the trial courts to issue subpoenas, as they do routinely, rather than for an appellate court to issue a subpoena, only then to send the case down to the trial court to conduct an evidentiary hearing.

Regardless of whether the Fourth Circuit was correct, this Court should not grant certiorari in a case where it would have to grapple with a contested issue of state procedural law before it could consider the application of federal habeas law. This Court routinely defers to lower court decisions about such matters. *See, e.g., Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (declining to address exhaustion/procedural bar issue because, "as we have repeatedly recognized, the courts of appeals . . . are more familiar than we with the procedural practices of the States in which they regularly sit");

*Granberry v. Greer*, 481 U.S. 129, 136 n.9 (1987) ("Petitioner has also contested the Court of Appeals' determination that he failed to exhaust his state remedies . . . On that issue, however, we defer to the Court of Appeals which is more familiar with Illinois' practice than we are"), *Rummel v. Estelle*, 445 U.S. 263, 267, n.7 (1980) (rejecting procedural default argument on the basis of deference to the Court of Appeals' interpretation of Texas contemporaneous-objection law); *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 153-54 (1979) (declining to find procedural bar where "three Second Circuit Judges, whose experience with New York practice is entitled to respect, concluded that the State's highest court had decided the issue on its merits"); *Butner v. United States*, 440 U.S. 48, 57-58 (1979) (lower courts better suited to decide questions of state law).

### C. The Fourth Circuit's Judgment Was Interlocutory In Nature, Which Makes This Case A Poor Choice For Certiorari Review.

The Fourth Circuit did not grant relief in this case, nor did it order the district court to grant relief. Instead, it vacated the district court opinion and remanded to the lower court for it to make findings and issue a decision in the first instance based upon the full record of the *Atkins* and *Atkins*-related claims.[20] *Winston*, 592 F.3d at 539. Under these circumstances, where the judgment is interlocutory in nature, this Court generally does not grant certiorari.[21] There is no reason to deviate

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[20] In fact, the Fourth Circuit did not address any of Winston's arguments as to why the district court should have considered the merits of the underlying *Atkins* claim. Specifically, the Fourth Circuit did not rule upon Winston's claims that he is actually innocent of capital murder under *Schlup v. Delo*, 513 U.S. 298 (1995), as he was not the triggerman in the crime, that he is innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992), that an *Atkins* claim cannot be waived in the first instance, or that an ineffective assistance of counsel claim alleged as cause and prejudice for the default of an underlying constitutional claim should not be subjected to AEDPA deference.

[21] *E.g.*, *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (denying certiorari where Court of Appeals remanded for further proceedings in district court and stating that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." (citing authorities)); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.").

from that general rule here. Certiorari should be denied.[22]

## III. THE JUDGMENT BELOW SHOULD BE AFFIRMED ON OTHER GROUNDS.

Even if this case were an appropriate vehicle through which the Court could address the questions allegedly presented, the outcome in this case likely will remain unchanged were this Court to reverse the Fourth Circuit's opinion on the grounds urged by the Warden. Even if § 2254(d) applies and even if the district court correctly excluded the IQ score of 66 from its analysis of this claim, the district court clearly erred in finding that the state court's assessment of *Strickland v Washington* prejudice was reasonable. In its adjudication of this claim, the Virginia Supreme Court unreasonably concluded that Winston "provides no documentation that he was diagnosed as being mentally retarded before the age of 18 in accordance with the legal definition of mental retardation established by the legislature." JA 305-06. This conclusion rests upon multiple unreasonable factual determinations, and therefore (d)(2) presents no barrier to relief.[23]

First, the Virginia Supreme Court characterized Winston's mental retardation diagnosis by Fairfax County Schools in a manner that was not supported by the record before it. The Virginia Supreme Court found that "the definitions of mental retardation provided by [Winston] demonstrate that for special-education eligibility, a candidate may, nonetheless, have an IQ score above 70." JA

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[22] The Warden, perhaps because she recognizes that certiorari generally is denied under these circumstances, mischaracterizes the Fourth Circuit decision as a grant of relief. Petition at i ("In granting habeas corpus relief to a state prisoner, did the Fourth Circuit impermissibly enlarge the Sixth Amendment right to effective assistance of counsel . . ."). The Warden also repeatedly claims that the Fourth Circuit "reversed" the district court judgment rather than vacated the district court judgment. *E.g.* Petition at 1, 4, 11.

[23] The state court's decision was both substantively and procedurally unreasonable. The district court recognized that "a state court's decision is based on an unreasonable determination of the facts not only when the state court's decision is based on facts that the record does not reasonably support but also when it resolves a factual issue without affording the petitioner process that is adequate under the circumstances to resolve the matter the court purports to resolve – when it resolves the facts in a procedurally unfair way." JA 2158 n.23. The court, however, did not address Winston's argument that the state court's adjudication was procedurally unreasonable.

305. In reality, the Fairfax County Schools definition of mental retardation is identical to, if not more stringent than, the Virginia definition.[24] The Fairfax County definition of the intellectual functioning prong, presented by Winston to the state court, requires that "[p]erformance on an appropriate, individually administered intelligence measure falls between two and three standard deviation units (plus or minus the standard error of measurement) below the age-appropriate norms."[25] JA 453. The Virginia definition requires "significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean." Va. Code Ann. § 19.2-264.3:1.1. There simply is no meaningful distinction that can be drawn between the two definitions. The only stylistic difference is that the Fairfax definition talks explicitly in terms of the standard error of measure, whereas the Virginia definition speaks in terms of accepted professional practice.

Both Dr. Reschly and Dr. Hagan testified before the district court that accounting for the standard error of measure is the accepted professional practice when interpreting obtained IQ

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[24] In addition to provisions in the Fairfax County Schools definition that mandate a level of intellectual functioning that is two standard deviations below the mean and significant deficits in adaptive functioning, the Fairfax definition further requires that "[a]cademic achievement is below age appropriate norms in the basic skills of reading, writing, and mathematics," and that deviations in intellectual and academic functioning are "not the result of sensory, environmental, or emotional deficits which would best be addressed in other programs." JA 454. Thus, the Fairfax definition is even more exacting than the Virginia definition.

[25] The commentary to the Fairfax definition, which appears directly following the definition itself, confirms that the Fairfax definition is identical to the Virginia definition. The commentary states that IQ scores that are "slightly" above 70 "may not be statistically significant." JA 454. This is a reference to the standard error of measure. It does not, as the Virginia Supreme Court has found, suggest that individuals with levels of intellectual functioning above 70 can still be classified as mentally retarded. Rather, it allows for individuals who have obtained scores that are slightly above 70, but who nevertheless have true levels of intellectual functioning that are below 70, still to be classified as mentally retarded. This is evident from the requirement in the Fairfax criterion that individuals with scores slightly above 70 can *only* be classified as mentally retarded "[i]f all additional information is consistent with the MR definition." JA 454.

scores.[26] Thus, the Fairfax definition and the Virginia definition provide for identical IQ thresholds, and the Virginia Supreme Court unreasonably found otherwise. The district court did not address these arguments, but instead merely characterized them as "quibbles." JA 2158.

Second, the Virginia Supreme Court found that "petitioner offers no objective data in support of his claim of mental retardation." JA 305. This is patently unreasonable. Winston presented the state court with a classification of mental retardation, when he was sixteen years old, under a definition of mental retardation that is materially indistinguishable from the Virginia definition. Further, he presented the state court with an affidavit from Jean Tansey, of Fairfax County Schools, that "it was the usual practice to perform updated psychological testing as well as an adaptive skills measure before classifying a student with mild retardation." JA 1349. Finally, he presented the state court with affidavits and educational records documenting his significant adaptive deficits detailed above. He also presented allegations and all the evidence he could without expert assistance regarding the Flynn Effect and the standard error of measure.[27] Thus, Winston presented evidence that he satisfies each prong of the Virginia definition of mental retardation. While it is somewhat unclear what the state court meant by "objective data," surely this term must encompass documentary evidence sufficient to satisfy the Virginia definition of mental retardation.

The district court concluded that, "given three full-scale [] IQ scores above 70 and potentially a fourth score that could be below 70," the state court's no-prejudice finding was not objectively

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[26] To the extent that the Virginia Supreme Court did not have the benefit of Dr. Keschly's and Dr. Hagan's testimony, it is because it denied Winston's request for expert assistance and for a hearing. In any event, Winston explained in his state habeas petition that taking into account the standard error of measure is part of accepted professional practice when assessing mental retardation.

[27] The state court makes no mention of either, other than to acknowledge that Winston argued for the consideration of the Flynn Effect in his state court pleadings. The state court simply ignored this evidence, which further supports Winston's contention that their factual determinations were unreasonable.

unreasonable. JA 2161. The district court's conclusion was clearly erroneous, even under its own findings in Winston's case. In its May 30, 2008, memorandum opinion granting an evidentiary hearing on this claim, the lower court concluded that the Virginia statute requires that an inmate possess an IQ score that "corresponds to an IQ of 70 or less." JA 612 (citing *Johnson v. Commonwealth*, 591 S.E.2d 47 (Va. 2004)). The lower court acknowledged that, "of course, the operative language of the Virginia statute is 'two standard deviations below the mean,'" and that "[a]n IQ score of 70 would only correspond to two standard deviations below the mean on a properly normed test." JA 612, n.12 (citing *Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005)). There is no question that the score obtained on the IQ test given to Winston when he was ten years old "corresponds to an IQ of 70 or less." Thus, the state court had before it *at least* one qualifying score.

## IV. THE SECOND QUESTION PRESENTED BY THE WARDEN IS BASED EXCLUSIVELY ON FALSE PREMISES

The Warden's second question presented to this Court is premised entirely on the contentions that 1) Winston's IQ score of 66 "did not exist" at the time of trial and 2) the well-established statistical studies proving that IQ norms become obsolete over time "did not exist" at the time of trial. Petition at i, 34-35. Both contentions are false.[28]

First, the notion that the 66 IQ score report did not exist at the time of trial is flatly contradicted by the record. Marilynn Lageman, the psychologist who administered the IQ test, conducted her evaluation on January 3, 1997, and she testified that she likely would have issued her report within two weeks of that date. JA 792, 817. The report has been in continuous existence since that point. At the time of Winston's June 2003 trial, Lageman was still living in Virginia and

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[28] Further, as noted *supra*, in her question presented the Warden falsely characterizes the Fourth Circuit's judgment in this case as a grant of habeas corpus relief. Petition at i.

employed as a school psychologist in Fairfax County. JA 783, 807. Lageman testified in district court that if trial counsel had contacted her in 2002 or 2003, she would have provided them with her report, which she had in her possession at that time, and she would have been willing to testify at trial.[29] JA 808, 828.

Second, the recognized statistical phenomenon that IQ norms become obsolete over time most certainly existed at the time of Winston's trial as well.[30] By June 2003, it was extremely well documented. *Thomas*, 614 F. Supp. 2d at 1275 ("The 'Flynn effect' is the name given in recognition of the central role played by Professor James R. Flynn in discovering and, in a series of fifteen or more publications between 1984 and today, documenting the fact that IQ scores have been increasing from one generation to the next in all fourteen nations for which IQ data is available."); *id.* at 1275 n.48 ("Flynn definitively set out the 0.30 point per year gain in a 1999 publication entitled 'Searching for Justice: The Discovery of IQ Gains Over Time,' 54 American Psychologist 5 (1999)."). Indeed, by 2002, the American Association of Mental Retardation (AAMR) had recognized the import of IQ norm obsolescence in the tenth edition of its definitive treatise. MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 56 (10th ed. 2002) ("as others have shown (e.g., Flynn, 1987), it is critically important to use standardized tests with the most updated norms."),

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[29] The Warden makes the allegation that Winston "never has contested" the fact that the 66 IQ score report did not exist at the time of trial. Petition at 35. The Warden's claim is absurd and the existence of Lageman's report at the time of Winston's trial frankly is beyond dispute.

[30] This phenomenon demonstrates that "as an intelligence test ages – or moves farther from the date on which it was standardized ('normed') – the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects." *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1276 (N.D. Ala. 2009). For Wechsler tests normed on the United States population, the rate of increase has consistently been 0.3 points per year. *Id.* at 1275-76. The Warden does not dispute the existence of this phenomenon. *E.g.* JA 1117-18 (district court testimony of the Warden's expert, Leigh Hagan) ("Q. As we sit here today, the Flynn effect is a recognized statistical phenomena [sic] in your field? A. Yes, I agree."). The Warden simply disagrees that it should have any application to this case.

*see also Atkins*, 536 U.S. at 308 n.3 (citing with approval the clinical definition set forth by the AAMR in their ninth edition manual, published in 1992).

Because the conflict identified by the Warden in her second question presented completely depends upon false premises, the Fourth Circuit's decision is not, in fact, in conflict with this Court's decisions in *Strickland* or *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009). The Warden additionally suggests that this Court should grant certiorari because the Fourth Circuit's decision conflicts with this Court's opinion in *Wood v. Allen*, 130 S. Ct. 841 (2010). The totality of the Warden's argument in support of this proposition is that "[j]ust as in Winston's case, Wood's trial counsel also had an expert's opinion that Wood was not retarded and who otherwise would not be beneficial to their client's case." Petition at 35-36. The Warden simply ignores the central fact of the *Wood* decision. This Court in *Wood* found that the state post-conviction court was not unreasonable in making the "factual determination that counsel's failure to pursue or present evidence of Wood's mental deficiencies was not mere oversight or neglect but was instead the result of a deliberate decision to focus on other defenses." *Wood*, 130 S. Ct at 850. Here, of course, there was no finding by the state court that trial counsel made a "deliberate decision" not to put forth a mental retardation defense (nor could there have been, as the state court declined to hold an evidentiary hearing). Further, in the hearing later held in district court, the evidence adduced could not have been more different from the evidence at issue in *Wood*. Specifically, trial counsel here testified that if he had noticed the mental retardation classification he "would have played it to the hilt," JA 696, and the trial expert testified that his opinion "might have been different" with the "wealth of other information" of mental retardation that was discovered in post-conviction proceedings. JA 720.

## CONCLUSION

The Warden's Petition for Writ of Certiorari should be denied

Respectfully submitted,

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